American Bar Association
www.supremecourtpreview.org

No. 08-88

IN THE
Supreme Court of the United States

STATE OF VERMONT,
Petitioner,
v.
MICHAEL BRILLON,
Respondent.

ON WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF VERMONT, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

STEVEN R. SHAPIRO
ROBIN L. DAHLBERG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

ANTHONY J. FRANZE
Counsel of Record
JOEL D. ROHLF
ARNOLD & PORTER LLP
555 12th Street N.W.
Washington, DC 20004
(202) 942-5000

MAUREEN DIMINO
INDIGENT DEFENSE COUNSEL
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street N.W.
12th Floor
Washington, DC 20036
(202) 872-8600

DAN BARRETT
ACLU OF VERMONT FOUNDATION
137 Elm Street
Montpelier, VT 05602
(802) 223-6304

Counsel for Amici Curiae

(*Additional Counsel listed on signature page*)

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iv
INTERESTS OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
STATEMENT OF THE CASE	4
I. THE RECORD	5
A. July 27, 2001 to November 19, 2001: Arrest, Arraignment, and Motion to Recuse	5
B. November 20, 2001 to February 25, 2002: A Delayed Bail Hearing, Trial Preparation, and Ammons's Withdrawal	6
C. February 25, 2002 to June 11, 2002: Harnett Withdraws over a Conflict, the Next Attorney Withdraws, and One Notice of Self Defense Is Filed	8
D. June 11, 2002 to June 14, 2004	11
1. Donaldson: Missed Deadlines and "Little or Nothing" Done ..	11

Contents

Page

2. Sleigh: Administrative Errors, Appointment Delay, Discovery Extension, Withdrawal 14

3. Moore: Four Months Without Counsel and Starting Over from Scratch 16

II. BRILLON'S APPEAL 17

ARGUMENT 18

I. THE VERMONT SUPREME COURT'S DECISION IS CONSISTENT WITH LONGSTANDING FEDERAL AND STATE COURT DECISIONS APPLYING *BARKER* 18

A. Courts Applying *Barker* Have Held That Appellate Delays Caused by Breakdowns in the Defender System Weigh Against the State 18

B. The Reasons for Weighing Public Defender Delay Against the State Are Even More Compelling in the Pretrial Context 24

Contents

Page

II. NO EXCEPTIONAL CIRCUMSTANCES EXIST TO WARRANT DISPLACING THE STATE COURT'S FACTUAL FINDINGS CONCERNING THE CAUSE FOR THE THREE-YEAR DELAY IN BRINGING BRILLON TO TRIAL 31

CONCLUSION 35

TABLE OF CITED AUTHORITIES

Page

CASES

324 Liquor Corp. v. Duffy,
479 U.S. 335 (1987) 4, 31

Allen v. State,
686 N.E.2d 760 (Ind. 1997),
cert. denied, 525 U.S. 1073 (1999) 22

Barker v. Wingo,
407 U.S. 514 (1972) ..... *passim*

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984) 31

Brookhart v. Janis,
384 U.S. 1 (1966) 31

Brooks v. Jones,
875 F.2d 30 (2d Cir. 1989) 19, 25

Brown v. Costello,
No. 00Civ.6421, 2004 WL 1837356
(S.D.N.Y. Aug. 17, 2004) 23, 25

Clark v. Arizona,
548 U.S. 735 (2006) 33

Coe v. Thurman,
922 F.2d 528 (9th Cir. 1990) 21

Cited Authorities

Page

Collins v. Rivera,
No. 99-CV-0490H, 1999 WL 1390244
(W.D.N.Y. Dec. 2, 1999) 23

Doggett v. United States,
505 U.S. 647 (1992) 27-29, 32

Drope v. Missouri,
420 U.S. 162 (1975) 31

Elcock v. Henderson,
942 F.2d 1004 (2d Cir. 1991) 21

Evitts v. Lucey,
469 U.S. 387 (1985) 18-19

Fiske v. Kansas,
274 U.S. 380 (1927) 31

Gaines v. Manson,
481 A.2d 1084 (Conn. 1984) 22

Geames v. Henderson,
725 F. Supp. 681 (E.D.N.Y. 1989) 24

Glover v. State,
817 S.W.2d 409 (Ark. 1991) 29

Harris v. Champion,
15 F.3d 1538 (10th Cir. 1994) ..... *passim*

Cited Authorities

Page

Harris v. Kuhlman,
601 F. Supp. 987 (E.D.N.Y. 1985) 24

Isaac v. Perrin,
659 F.2d 279 (1st Cir. 1981) 30

Lloyd A. Fry Roofing Co. v. Wood,
344 U.S. 157 (1952) 31-32

McKane v. Durston,
153 U.S. 684 (1894) 18

Middlebrook v. State,
802 A.2d 268 (Del. 2002) 28-29

Neal v. Murray,
No. 98-CV-638H, 1999 WL 1390243
(W.D.N.Y. Oct. 5, 1999) 23

People v. Johnson,
606 P.2d 738 (Cal. 1980) 28-29

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 33

Rheuark v. Shaw,
628 F.2d 297 (5th Cir. 1980) 26

Ruffin v. State,
663 S.E.2d 189 (Ga. 2008) 29

Cited Authorities

Page

Sanchez v. Superior Court,
182 Cal. Rptr. 703 (Cal. Ct. App. 1982) 29

Simmons v. Beyer,
44 F.3d 1160 (3d Cir.),
cert. denied, 516 U.S. 905 (1995) 3, 19-20, 26-27

Simmons v. Reynolds,
898 F.2d 865 (2d Cir. 1990) 19, 21, 25

Snyder v. Kelly,
769 F. Supp. 108 (W.D.N.Y. 1991),
aff'd, 972 F.2d 1328 (2d Cir. 1992) 23-24

Spradlin v. State,
587 S.E.2d 155 (Ga. Ct. App. 2004) 22

State v. Blair,
103 P.3d 538 (Mont. 2004) 29

State v. Brillon,
955 A.2d 1108 (Vt. 2008) ..... *passim*

State v. Bussart-Savaloja,
No. 98,527, 2008 WL 5101223
(Kan. Ct. App. Dec. 5, 2008) 22

State v. Dumas,
No. 98 CA 167, 2002 WL 31718862
(Ohio Ct. App. Nov. 26, 2002) 22-23

Cited Authorities

Page

State v. Frausto,
53 P.3d 486 (Utah Ct. App.),
cert. denied, 63 P.3d 104 (Utah 2002) 30

State v. Kurz,
No. A04-1255, 2005 WL 1514420
(Minn. Ct. App. June 28, 2005) 29-30

State v. Stock,
147 P.3d 885 (N.M. Ct. App. 2006) 29

State v. Walker,
667 A.2d 1242 (R.I. 1995) 27

Threatt v. State,
640 S.E.2d 316 (Ga. Ct. App. 2006),
cert. denied, 2000 Ga. LEXIS 337
(Ga. April 24, 2007) 24

Time, Inc. v. Firestone,
424 U.S. 448 (1976) 32

United States v. Brown,
No. 05-4662, 2008 WL 4180051
(4th Cir. Sept. 10, 2008) 21, 25

United States v. Denson,
668 F. Supp. 1531 (S.D. Fla. 1987),
aff'd, 859 F.2d 925 (11th Cir. 1988) 30

Page

United States ex rel. Green v. Washington,
917 F. Supp. 1238 (N.D. Ill. 1996) 23, 26

United States v. Moreno,
63 M.J. 129 (C.A.A.F. 2006) ..... *passim*

United States v. Williams,
128 S. Ct. 1830 (2008) 33

Yourdon v. Kelly,
769 F. Supp. 112 (W.D.N.Y. 1991) 25

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VI 4

Prison Rape Elimination Act of 2003 § 2(2),
42 U.S.C. § 15601(2) 27

Vt. Stat. Ann. tit. 13, § 5252 14

Vt. Stat. Ann. tit. 13, § 5272 14

Page

OTHER MATERIALS

Comm'n on Safety and Abuse in America's Prisons, *Confronting Confinement* (2006), *available at* http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf 27-28

Erik Fitzpatrick, *Report of Indigent Defense Task Force* (2001), *available at* http://web.archive.org/web/20020920154231/www.defgen.state.vt.us/readings/idtreport.pdf ... 7, 11-12

Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379 (2000) 27

Associated Press, *Prison's Deadliest Inmate, Hepatis C, Escaping*, MSNBC, March 14, 2007, http://www.msnbc. msn.com/id/17615346/ 27

Vt. Admin. Order No. 4, § 1 14

INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the protection of Sixth Amendment rights and the vindication of constitutional rights more generally have been a central focus of the ACLU, which has appeared before this Court in numerous Sixth Amendment cases, both as direct counsel and as *amicus curiae*. ACLU of Vermont is one of its state affiliates.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of more than 12,000 and affiliate memberships of almost 40,000. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has frequently appeared as *amicus curiae* before this Court in cases concerning the Sixth Amendment as well as substantive criminal law and procedure.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Amici are acutely aware of the strain that underfunded, mismanaged, or poorly supervised public defenders' offices impose on indigent defendants and have a strong interest in ensuring that such defendants receive the full protections of the Constitution. The Vermont Supreme Court's decision below is consistent with longstanding application of *Barker v. Wingo*, 407 U.S. 514 (1972), and should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Vermont Supreme Court held that delays caused by a breakdown in the state's public defender system and the accompanying inaction by assigned counsel weigh against the state under the *Barker v. Wingo* balancing test. Petitioner Vermont asserts that this was "a first in the history of American jurisprudence" and "turns thirty-six years of settled jurisprudence into chaos." Pet'r Br. 1. That is incorrect. As Respondent Brillon demonstrates, courts applying *Barker* repeatedly have weighed such pretrial delays against the state. Resp't Br. 39-42.

As we show here, moreover, decades of jurisprudence in the closely related post-trial context illustrate the sound reasons for weighing these types of delays against the state. Courts applying *Barker*—including the Second, Third, Fourth, Ninth, and Tenth Circuit Courts of Appeals, multiple state courts, and the Armed Forces Court of Appeals—have held that delays caused by breakdowns in the appellate defender system weigh against the state. And far from creating "chaos in a vital area of criminal law," Pet'r Br. 3, these decisions

have been consistently followed and applied by lower courts for decades.

Nothing about pretrial proceedings would have justified the Vermont Supreme Court's departure from the principles embodied in these cases. On the contrary, "[a]lthough the interests at stake before trial and before appeal obviously differ, they are sufficiently similar to warrant the same general approach." *Simmons v. Beyer*, 44 F.3d 1160, 1169 (3d Cir.), *cert. denied*, 516 U.S. 905 (1995). If anything, a defendant experiencing excessive pretrial delays warrants even greater Constitutional protection.

Adopting Vermont and its government-*amici*'s[2] bright line rule, then, would result in one of two outcomes: either (1) abrogation of longstanding state and federal jurisprudence; or (2) a legal framework in which *Barker* allocates responsibility for public defender system-caused delays on appeal differently than identical delays at the pretrial level, where the risk of prejudice to defendants is greater. By contrast, the Vermont Supreme Court's decision, which allows courts to determine when and how such delays should be weighed against the state under the *Barker* balancing test, fits squarely within existing jurisprudence.

---

[2] Vermont's only non-government-affiliated *amici* (and presumably the few *amici* without a financial stake in funding indigent defense) "agree that continuances and delays caused solely by an indigent defendant's public defender can rise to a speedy trial violation if attributable to the inability or unwillingness of the state public defender system to appoint adequate counsel in a timely manner." Br. of *Amici Curiae* Vermont Network Against Domestic and Sexual Violence et al. 26-27.

II. Given the well-established jurisprudence in this area, Vermont and its *amici*—through a selective and inaccurate characterization of the record—attempt to call into doubt the reasons for the nearly three-year delay in bringing Brillon to trial. But the Vermont Supreme Court, as the proper umpire for any factual dispute, has already called this play. It found that Brillon did not act with improper intent when he repeatedly sought counsel who would adequately prepare for a trial in which he faced a possible life sentence.

This Court "accept[s] the factual findings of state courts in the absence of exceptional circumstances." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987). Vermont and its *amici* have not addressed, much less attempted to satisfy, the exceptional circumstances standard, and this Court should decline their invitation to disturb the Vermont Supreme Court's detailed factual findings. This Court should affirm.

STATEMENT OF THE CASE

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. For nearly three years, Brillon was incarcerated without bail before being tried as a habitual offender facing the possibility of life imprisonment. Vermont and Brillon set forth diametrically opposed reasons for the three year delay. *Compare* Pet'r Br. 4-23 *with* Resp't Br. 1-26. Our independent review of the record confirms Brillon's and the Vermont Supreme Court's recitation, and directly contradicts Vermont's version of events.

I. THE RECORD

The Vermont Supreme Court set out a useful framework for considering the record, dividing the three years of Brillon's pretrial incarceration into four distinct periods:

- From July 2001 to November 2001, during which the court attributed any delay to Brillon. *State v. Brillon*, 955 A.2d 1108, 1120 (Vt. 2008).

- From November 2001 to February 2002, which the court did "not count heavily, if at all against the state." *Id.*

- From February 2002 to June 2002, a period that the court did not count against the state. *Id.*

- From June 2002 to June 2004, a two year delay that the court weighed against the state. *Id.* at 1121.

A. July 27, 2001 to November 19, 2001: Arrest, Arraignment, and Motion to Recuse

On July 27, 2001, police arrested Brillon for domestic assault after he hit his estranged girlfriend, Michelle Tatro. Three days later, Brillon was arraigned and charged with second degree aggravated assault and as a habitual offender. J.A. 12-14. At arraignment, Brillon was ordered held without bail until an evidentiary bail hearing, scheduled for August 13, 2001 (later rescheduled by the court to August 15, 2001). *Id.* at 14.

On August 14, 2001, the prosecutor and Richard Ammons, Brillon's appointed counsel, stipulated to a continuance of the bail hearing. J.A. 15, 86-88. Ammons was a recent hire of the Bennington County Public Defender's Office and needed time to move his office to Brattleboro. J.A. 87. On October 2, 2001, Ammons asked for another continuance of the bail hearing to allow time to file a motion to recuse the trial judge, Karen Carroll, because she had presided over a family court dispute related to the charged assault. J.A. 15; *Brillon*, 955 A.2d at 1117. The next day, Ammons filed the motion to recuse, which was denied by Judge Carroll on October 9, 2001, and by an administrative judge on November 20, 2001. J.A. 16. The Vermont Supreme Court did not attribute any of these relatively routine pretrial delays to the state. *Brillon*, 955 A.2d at 1120.

B. November 20, 2001 to February 25, 2002: A Delayed Bail Hearing, Trial Preparation, and Ammons's Withdrawal

After the denial of Brillon's motion to recuse, the prosecutor moved for a February 2002 trial date, which was granted by the court. J.A. 17, 89-90.

The court held a bail hearing on January 16, 2002, and Judge Carroll ordered Brillon held without bail. J.A. 18.

On January 17, 2002, Ammons moved for a continuance in order to: (1) conclude the deposition of Tatro, Brillon's estranged girlfriend and a material prosecution witness; (2) depose additional witnesses disclosed by the prosecution on January 9, 2002; and

(3) complete an investigation that was delayed because a potential witness had been away on "medical leave" and unable to meet with Ammons. J.A. 91-92. The prosecution opposed continuance. J.A. 94-96. It argued, among other things, that "this is a simple domestic assault trial . . . . It is difficult to comprehend how defense counsel could still be working to develop its 'case in chief' so long after the incident." J.A. 95. On January 23, 2002, the trial judge denied the motion to continue and scheduled a jury draw for February 26, 2002 with the trial to begin on February 27th. J.A. 19.

On February 22nd, five days before Brillon's trial, Ammons filed a "Second Motion to Continue." J.A. 97-102. There, Ammons explained that "there remain[ed] significant matters that must be addressed . . . before counsel will be prepared to go forward at trial." J.A. 99. His motion added that his lack of preparation was because of "a large backlog of unfinished and untouched cases in the office." J.A. 97-98. Ammons noted that he had "an inordinately large caseload," which had only recently been "trimmed" to "174 clients with 331 charges, 55 of which [were] felonies." J.A. 98.

On February 22nd, the court held a hearing on Ammons's continuance motion. J.A. 20. During the hearing, Ammons represented that he was not prepared for trial because the "Public Defenders are under funded and under staffed." J.A. 165.[3] The trial court denied the

[3] Ammons's representations were consistent with a 2001 report on indigent defense in Vermont, which found that the Vermont's Defender General's Office was significantly understaffed. *See* Erik Fitzpatrick, *Report of Indigent Defense Task Force* 12 (2001), *available at* http://web.archive.org/web/20020920154231/www.defgen.state.vt.us/readings/idtreport.pdf [hereinafter *Vermont Indigent Defense Report*].

motion. J.A. 20. At the end of the hearing, Brillon, who had watched via interactive television and heard that his lawyer was unprepared for a trial scheduled for less than a week away, told Ammons, "You're fired, Rick." J.A. 187.

In response to Brillon's attempt to discharge him, and in light of a conflict of interest created by his office's representation of a potential witness in Brillon's case, Ammons moved to withdraw as counsel on February 25, 2002. J.A. 20, 103-06. Because of the potential conflict and the breakdown of the attorney-client relationship, the court granted Ammons's motion to withdraw and appointed Matthew Harnett as Brillon's lawyer. J.A. 21, 192, 202. The court also cancelled the jury draw and trial date. J.A. 21.

The Vermont Supreme Court weighed this period of delay, including the period caused by Ammons's admitted unpreparedness, not heavily, if at all, against the state. *Brillon*, 955 A.2d at 1120.

C. February 25, 2002 to June 11, 2002: Harnett Withdraws over a Conflict, the Next Attorney Withdraws, and One Notice of Self Defense Is Filed

Ammons's replacement, Harnett, withdrew over a conflict on March 1, 2002, a few days after his appointment. J.A. 21. The court appointed Gerard Altieri to replace Harnett. *Id.*

On April 2, 2002, Altieri filed a Notice of Self Defense on behalf of Brillon, the first and only substantive filing he would make in the case. *Id.*

Brillon filed a *pro se* motion to dismiss Altieri on May 20, 2002. J.A. 22, 113-14. On June 11, 2002, the court held a hearing on Brillon's motion, during which Brillon complained about the excessive pretrial delays:

> I have been in jail for almost a year. I've got letters here directed towards the judge about waiving my 60-day rule. ***I want to be brought to trial. I want to be brought to trial.***

J.A. 23, 209 (emphasis added). Brillon also claimed that Altieri had spoken with him only two times: once for twenty minutes and a second time in a crowded hallway filled with Altieri's other clients. J.A. 208-09.

Altieri admitted that Brillon had some valid points, but disputed much of Brillon's position. J.A. 207-09. He claimed that he had met with Brillon twice for a total of two hours, and suggested that it was a "simple case" that would not require much work.[4] J.A. 207, 218.

During the course of this hearing, Altieri and Brillon bickered back and forth. *See generally* J.A. 207-26. It began when the court asked Altieri if he had reviewed Brillon's motion with his client. J.A. 206-07. Altieri said he had not, but added, apparently to both the court and Brillon, that "I have been up to the jail twice to meet with you for almost two hours, and that's a record for

---

[4] It is unclear from the record whether Brillon had a trial date at this time. During the hearing on Brillon's motion to dismiss counsel, Altieri stated that the case would be on the September docket after the rotation of Judge Wesley. The court, however, indicated that it was unsure when the case was scheduled to go to trial. J.A. 219.

me going up there and sitting down and talking so a lot of this stuff, you know. *Michael has his issues*." J.A. 207 (emphasis added). Brillon responded, "Mr. Altieri, I don't know how you figure you spoke to me for two hours." J.A. 208. Eventually, the court tired of the exchanges and threatened both Brillon and Altieri with contempt. J.A. 214, 216. The situation appears to have deteriorated further when Altieri, in open court, disparaged Brillon, criticizing what he described as his client's case strategy of wanting to go on a "fishing expedition and haul in people and relatives just to trash" Tatro. J.A. 218.

Following a break in the hearing, Altieri claimed that Brillon had threatened his life, prompting him to move to withdraw. J.A. 223-25. Specifically, Altieri claimed that Brillon stated, "If it takes 20 years to get even with you, I will get you." J.A. 224. Brillon denied that he had threatened Altieri's life. J.A. 225.

The court granted Brillon's motion to dismiss Altieri, noting that it was "a dubious victory in your case because it simply prolongs the time that you will remain in jail until we can bring this matter to trial . . . ." J.A. 226. The court added that it might be some time before new counsel could be appointed because "I know for a fact that our resources for ad hoc counsel are perilously thin." J.A. 227.

The Vermont Supreme Court did not weigh the delay from this period against the state. *Brillon*, 955 A.2d at 1120.

D. June 11, 2002 to June 14, 2004

1. Donaldson: Missed Deadlines and "Little or Nothing" Done

A June 11, 2002 docket entry indicates that Paul Donaldson was the next lawyer assigned to represent Brillon. J.A. 23. The Vermont Defender General's Office approved the appointment of Donaldson, even though Donaldson's contract with the Defender General was to expire in a few days. J.A. 23, 232-33 (stating "my contract with the Defender General's office had expired in June, which was in Mr. Brillon's case . . . basically the beginning of my departure from the contract"). Because of this, Donaldson did little or no work to advance the case towards trial, instead devoting his time to attempting to have the case reassigned. J.A. 233; *Brillon*, 955 A.2d at 1121 (stating Donaldson did "little or nothing").

The difficulties Brillon encountered with the appointment of contract counsel were not uncommon in Vermont, as noted in a 2001 report concerning a "crisis" in Vermont's assigned counsel program.[5]

---

[5] The report identified three central problems:

> First, the assigned counsel program, which provides representation when frontline public defenders have conflicts of interest, is continuously in a virtual state of crisis: every witness with an opinion on the subject agreed that assigned counsel are all too often inexperienced lawyers providing substandard representation with inadequate supervision,

(Cont'd)

The record reflects that Donaldson did nothing other than appear at an August 5, 2002 status conference. J.A. 23. At that conference, the court set the following filing deadlines for the defense: (1) "Defense to respond no later than 08/23/02 regarding any prior notice of bad acts evidence"; and (2) "Defense to disclose witnesses no later than 9/16/02." *Id.* The case also was to be placed on the October 2002 jury list. *Id.*

Donaldson missed the August 23 filing deadline for bad acts evidence. *Id.* He then missed the September 16 witness disclosure deadline. *Id.* Finally, the October jury list date passed, and neither Donaldson nor the court took any action. J.A. 23-24.

(Cont'd)

> compensated at rates so low they lose money while doing so, and that for these reasons they quit their contract as soon as they can find other employment with consistent benefits and reasonable hours.
>
> Second, the public defenders' overwhelming caseload is another serious problem: on average, public defenders are handling almost double the number of cases recommended by national guidelines.
>
> Third, the Office of Defender General itself is significantly understaffed; the Defender General is required to perform the same duties delegated to several high level administrators in other states, without comparable administrative or investigative support.

Vermont Indigent Defense Report, *supra*, at 6. The report attributed these problems to "underfunding." *Id.*

In the meantime, Brillon wrote a letter to the judge informing him of Donaldson's lack of progress and that Donaldson was no longer taking appointments. J.A. 153-54. In his August 25, 2002 letter (two days after Donaldson missed the bad acts notice deadline), Brillon again expressed that he wanted to go to trial, but needed an attorney who would devote time to his case. J.A. 153 ("nor has it ever been my intention to delay any court proceedings as you know I have been in prison for 14 months and any normal person would never delay the possibility of getting out of jail, and I will win if I ever get an attorney that will work with me").

Two months later, on October 22, 2002, with the docket showing no work by Donaldson, Brillon moved *pro se* to dismiss Donaldson. J.A. 22-23. Brillon claimed that Donaldson had failed to file motions on his behalf, had not communicated with him, refused to provide him with discovery material, and had made no attempt to create an attorney-client relationship. J.A. 115.

On November 26, 2002, the court held a hearing regarding the motion to dismiss Donaldson. J.A. 24. At that hearing, Donaldson did not dispute Brillon's grounds to dismiss him as counsel. Rather, Donaldson stated that his contract was ending, that he had requested that the case be reassigned, and that a recent letter from the Defender General's Office suggested that the case would be reassigned. J.A. 232-33. During the hearing, Brillon again expressed his desire to go to trial within 60 days and highlighted the delays caused by his succession of unprepared assigned counsel. J.A. 236.

The trial court granted the motion to remove Donaldson from the case "for all reasons, including yours [Brillon's]." J.A. 238.

2. Sleigh: Administrative Errors, Appointment Delay, Discovery Extension, Withdrawal

Following the hearing on November 26, 2002, the docket indicates that the court was to send a notice to David Sleigh that he had been appointed to represent Brillon. J.A. 24-25. Sleigh was not officially appointed, however, until January 15, 2003. J.A. 25. It is not clear from the record what caused the appointment delay. At a status conference on January 8, 2003, Sleigh, participating by telephone, informed the court that he was not appearing as Brillon's counsel but as "just another lawyer in Vermont." J.A. 244. He further stated that although he had been notified via e-mail on December 2, 2002 that he might be assigned Brillon's case and had been told to review the paperwork to identify any conflicts, *id.*, he had yet to receive the file or official notification of his assignment. J.A. 244-46.[6]

---

[6] The Defender General's Office blamed the court for failing to provide Sleigh with timely notice of his assignment. J.A. 155-56. Under the Vermont indigent defense system, the duty to appoint counsel falls partially on the court and partially on the Defender General. Vt. Stat. Ann. tit. 13, § 5272 ("If the public defender assigned to the court's jurisdiction is unable to represent the person, the court concerned shall assign an attorney to represent the person."); Vt. Admin. Order No. 4, § 1 (providing that assigned counsel must generally be an attorney with whom the Defender General has contracted). The Defender General is appointed by the governor subject to ratification by the state senate. Vt. Stat. Ann. tit. 13, § 5252.

As a result, Brillon was incarcerated and effectively without representation for almost two months.

At the status conference, the judge ordered the Defender General's Office to appoint counsel within 14 days. J.A. 252-53. The prosecutor noted that this order was similar to an order issued a month before, J.A. 248, and suggested that the court order a show-cause hearing requiring the "Defender General to either provide an explanation as to why counsel has not been assigned or to present an attorney before the Court." J.A. 249. The prosecutor asserted that "it seems apparent that the Defender General had previously ignored Judge Suntag's Order, or not complied with it in such a manner that made representation of Mr. Brillon possible." *Id.*

Sleigh was formally appointed on January 15, 2003. J.A. 25. He first appeared on Brillon's behalf at a February 19, 2003 status conference. *Id.* At this conference, deadlines for pretrial notices and motions were set and Brillon was assigned a May 2003 trial date. J.A. 25-26. Five days later, Sleigh filed a motion to extend the deadlines for the defense witness list and discovery but not the May trial date. J.A. 26. The trial court granted the extension on March 17, 2003. J.A. 27. Then, on April 10th, a month before Brillon was scheduled to go to trial, Sleigh wrote Brillon a letter stating that he would be withdrawing as counsel because of "modifications to our firm's contract with the Defender General." J.A. 158. The same day, Sleigh filed notice of his withdrawal with the court. J.A. 118.

3. Moore: Four Months Without Counsel and Starting Over from Scratch

After Sleigh withdrew, neither the Defender General's Office nor the court secured Brillon counsel for nearly four months. J.A. 27-28 (showing an empty docket for April, May, June, and July 2003 with the exception of *pro se* motions filed by Brillon and a rescheduling of the status conference). On June 20, 2003, however, a representative from the Defender General's Office informed the court that funding had been received for a new "serious felony unit" and attorney Kathleen Moore would staff that position on August 1, 2003. J.A. 159-60.

Meanwhile, Brillon, who had been imprisoned for nearly two years without a trial, filed *pro se* motions to dismiss for lack of a prima facie case, ineffective assistance of counsel, and violations of his speedy trial right. *See generally* J.A. 119-36. The court did not rule on these motions. J.A. 28.

On August 1, 2003, Kathleen Moore was formally appointed Brillon's attorney. J.A. 28. On August 11th she made an appearance on his behalf at a status conference, which was subsequently adjourned for 30 days. *Id.* In mid-September, the court ordered "[a]ll pending defense motions are withdrawn" and set a sixty-day deadline for all new or refiled motions. J.A. 29. On November 3, 2003, Moore filed a request to extend the motions deadline to December 8th because she was still "awaiting additional deposition transcripts and case materials from prior counsel," some of whom had been unavailable to talk with her about the case. J.A. 137. The court granted the extension. J.A. 30.

The docket reflects no formal filings or case activities between November 14, 2003 and February 11, 2004, at which time Moore requested and received another continuance. J.A. 31. On February 23, 2004, Moore filed a motion to dismiss alleging speedy trial and other violations. J.A. 31 (docket mislabels as motion in limine); *Brillon*, 955 A.2d at 1120. The court denied the motion to dismiss on April 19, 2004. J.A. 32. On April 26, 2004, a status conference was held, and a fourth trial date was set for June 15, 2004, almost three years after Brillon's arrest. J.A. 33.

The Vermont Supreme Court weighed against the state the two-year delay resulting from the inability or unwillingness of assigned counsel to move the case forward. *See Brillon*, 955 A.2d at 1121.

On June 14, 2004, Brillon had a jury drawn for trial. J.A. 38. On June 17, 2004, after a three day trial, Brillon was found guilty. J.A. 38-39. After a number of delays and continuances, Brillon was sentenced to 12 to 20 years in prison. J.A. 54.

II. BRILLON'S APPEAL

Brillon appealed. On April 16, 2008, the Vermont Supreme Court vacated his convictions and dismissed the charges, holding that Brillon had been denied his right to a speedy trial "because of the inaction of assigned counsel or a breakdown in the public defender system." *Brillon*, 955 A.2d at 1111.

ARGUMENT

I. THE VERMONT SUPREME COURT'S DECISION IS CONSISTENT WITH LONGSTANDING FEDERAL AND STATE COURT DECISIONS APPLYING *BARKER*

A. Courts Applying *Barker* Have Held That Appellate Delays Caused by Breakdowns in the Defender System Weigh Against the State

As Respondent Brillon demonstrates, state high courts that have considered the issue have found, like the Vermont Supreme Court, that pretrial delays caused by breakdowns in public defender systems weigh against the state. *E.g.*, Resp't Br. 39-40. As we show here, moreover, the Vermont Supreme Court's decision is consistent with a long line of carefully reasoned decisions evaluating the second *Barker* factor—the reason for the delay—to determine whether post-trial delays are constitutionally excessive. These courts, including the Second, Third, Fourth, Ninth, and Tenth Circuit Courts of Appeals, multiple state courts, and the Armed Forces Court of Appeals, have held that appellate delays caused by breakdowns in defender systems weigh against the state.[7]

---

[7] The Constitution does not require states to grant appeals as of right to criminal defendants. *McKane v. Durston*, 153 U.S. 684, 687 (1894). But when a state has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of

(Cont'd)

For example, in *Brooks v. Jones*, 875 F.2d 30 (2d Cir. 1989), the court found that eight years of appellate delay had been caused by "a succession of assigned counsel, who relieved one another but did little else, and [] a pervasive want of effective supervision of the process by which the post-conviction review of indigents' rights are vindicated." *Id.* at 31. Applying *Barker*, the court charged these delays against the state, not the indigent defendant, noting that "[w]e reach our result in this case only upon a consideration of all the relevant factors, which include not only the length of the delay suffered by [the defendant], but also the state's lack of a legitimate reason for it . . . ." *Id.*; *accord Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990) (applying second *Barker* factor and weighing appellate delay against state where "no acceptable reason for the delay has been urged; and it was caused, at least in part, by the state court's failure to supervise its appointed attorneys and to monitor its own calendar").

The Third Circuit reached a similar conclusion in *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir.), *cert. denied*, 516 U.S. 905 (1995), where the defendant's appeal "slipped through the cracks," *id.* at 1169, and years of appellate delay resulted from the inaction of his public defender, notwithstanding the defendant's repeated inquiries and requests to move the case forward. *Id.* at

---

(Cont'd)

the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (internal citation and quotation marks omitted). Applying these principles, several circuits and lower courts have held that excessive appellate delays can violate due process. *See*, *e.g.*, *Simmons v. Beyer*, 44 F.3d at 1169 n.6.

1163-64. In balancing the second *Barker* factor, the court found that "[r]esponsibility for this delay cannot be charged against Simmons, the victim of ineffective lawyers," and instead allocated responsibility to the state. *Id.* at 1170. The court vacated the conviction and ordered a new trial because the long appellate delay "resulted in the loss or destruction of the voir dire transcripts," impairing review of the defendant's *Batson* claims. *Id.* at 1171.

Similarly, the Tenth Circuit has held that excessive appellate delays caused by breakdowns in the Oklahoma public defender system violated indigent defendants' due process rights. *E.g.*, *Harris v. Champion*, 15 F.3d 1538, 1546 (10th Cir. 1994). At the time, the state public defender system was so underfunded and mismanaged that it routinely delayed three or more years before filing opening briefs on behalf of indigent defendants. *See id.* at 1546. "The only reasons offered by the State [for the delays] were the lack of funding and, possibly, the mismanagement of resources by the Public Defender." *Id.* at 1562. In applying *Barker*, the court noted that it previously had "laid to rest" the arguments, identical to those made by Vermont and its government-*amici* here, that delays caused by public defenders must be attributed to indigent defendants. *Id.* at 1562. Indeed, the "parties [did] not dispute that the delays in adjudicating petitioners' direct criminal appeals [were] attributable to the State of Oklahoma and not to petitioners."[8] *Id.* Because the "lack of funding and,

[8] The court noted that Oklahoma—one of Vermont's *amici* here—conceded in a submission made by the Oklahoma Attorney General that delays caused by backlogged public defenders were not attributable to the defendant. *Harris*, 15 F.3d at 1562 n.13.

possibly, the mismanagement of resources," resulted in "the inability of the Public Defender to address [the defendant's] case in a timely fashion," the court weighed the delays against the state under *Barker*. *Id.*

The Fourth and Ninth Circuits are in accord. *See United States v. Brown*, No. 05-4662, 2008 WL 4180051, at *2 (4th Cir. Sept. 10, 2008) (unpublished per curiam) (finding that under *Barker* lengthy delay on appeal due to multiple substitutions of appointed counsel weighed against the state); *Coe v. Thurman*, 922 F.2d 528, 531-32 (9th Cir. 1990) (attributing the majority of delay to court reporter and police department, but acknowledging that systemic failures noted in *Simmons v. Reynolds*, 898 F.2d 865, and *Elcock v. Henderson*, 942 F.2d 1004 (2d Cir. 1991), are appropriate reasons to weigh delay against the state).

The Court of Appeals for the Armed Forces also has weighed delays caused by the inaction of overburdened appointed defense counsel against the government under *Barker*. *Id.* In *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006), a defendant's appeal was delayed because his appointed counsel requested eighteen extensions of time due to "other case load commitments." In holding that due process had been denied, the court recognized that counsel's "'[o]ther case load commitments' logically reflects that Moreno's case was not getting counsel's professional attention, a fact that is the very antithesis of any benefit to Moreno." *Id.* The court concluded that responsibility for such delays must rest with the government: "While appellate defense counsel's caseload is the underlying cause of much of this period of delay, responsibility for this

portion of the delay and the burden placed upon appellate defense counsel initially rests with the Government." *Id.* The court reasoned that "[t]he Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation." *Id.*

State courts, too, have applied *Barker* in assessing appellate delays and have attributed inaction of appointed counsel resulting from breakdowns in public defender systems against the state. *See*, *e.g.*, *Gaines v. Manson*, 481 A.2d 1084, 1095 (Conn. 1984) (under *Barker*, delay due to understaffing of appellate defender's office weighed against the state); *Spradlin v. State*, 587 S.E.2d 155, 160 (Ga. Ct. App. 2004) (under *Barker*, twelve-year delay in defendant's appeal due to public defender's inaction weighed against state because "[a]ny failure of the indigent defense system to represent its clients is directly or indirectly the responsibility of the State and the trial court to oversee the functioning of the criminal justice system"); *Allen v. State*, 686 N.E.2d 760, 783-84 (Ind. 1997) (finding delay in appointment of counsel weighed in defendant's favor under *Barker*, but no prejudice), *cert. denied*, 525 U.S. 1073 (1999); *State v. Bussart-Savaloja*, No. 98,527, 2008 WL 5101223, at *5 (Kan. Ct. App. Dec. 5, 2008) (refusing to attribute an 18-month delay in appointing appellate counsel to indigent appellant and noting that "[r]easons such as lack of funding, briefing delay by court-appointed attorneys, and mismanagement of resources by public defender offices are not considered acceptable excuses for inordinate delay," (citing *Harris*, 15 F.3d at 1562)); *see also State v. Dumas*, No. 98 CA

167, 2002 WL 31718862, at *7-9 (Ohio Ct. App. Nov. 26, 2002) (unpublished) (applying *Barker* to aid "in fashioning a remedy" for a violation of a defendant's right to effective assistance of counsel, even though it was not clear state law recognized a right to speedy appeal, and finding that "[d]elays arising from the inaction of [appointed] appellate counsel on appeal are not typically attributed to the defendant, at least with respect to the federal speedy trial arena").

Far from creating "chaos in a vital area of criminal law," Pet'r Br. 3, these decisions have been applied consistently for decades.[9]

---

[9] *See*, *e.g.*, *Brown v. Costello*, No. 00Civ.6421, 2004 WL 1837356, at *3 (S.D.N.Y. Aug. 17, 2004) (unpublished) (under *Barker*, delay "caused primarily by turnover of appointed counsel . . . is attributable to the state"); *Collins v. Rivera*, No. 99-CV-0490H, 1999 WL 1390244, at *4 (W.D.N.Y. Dec. 2, 1999) (unpublished) (under *Barker*, "where the delay in perfecting an appeal is caused by the inaction of and turnover in assigned counsel [due in part to other caseload commitments], the courts have consistently attributed that delay to the state"); *Neal v. Murray*, No. 98-CV-638H, 1999 WL 1390243, at *2 (W.D.N.Y. Oct. 5, 1999) (unpublished) (under *Barker*, delay caused by public defender's "backlog of cases" was weighed against the state); *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1272-73 (N.D. Ill. 1996) (under *Barker*, "systemic delays" caused by underfunding and backlog at appellate defender's office weighed against state; noting that "[t]o deny an indigent [appellant] access to his appeal and then to hold him or her responsible for that denial would be truly Kafkaesque"); *Snyder v. Kelly*, 769 F. Supp. 108, 111 (W.D.N.Y. 1991) (under *Barker*, delay "due to the brobdingnagian case load of assigned counsel, as well as the inattention of the Appellate Division"

(Cont'd)

B. The Reasons for Weighing Public Defender Delay Against the State Are Even More Compelling in the Pretrial Context

In performing the "difficult and sensitive balancing process" required by *Barker*, 407 U.S. at 533, court after court has found that it would be fundamentally unfair to charge indigent defendants—even those already convicted at trial—for delays caused by breakdowns in public defender systems. In these cases, the delays ultimately are attributed not to the defendant, but to the state.

Nothing about pretrial proceedings would have justified the Vermont Supreme Court's departure from the uniform principles embodied in these cases. On the contrary, the reasons for delay in Brillon's case mirror the breakdowns of the appellate indigent defense systems. As with Brillon, delays resulted from successive appointed counsel who "relieved one another but did

---

(Cont'd)

weighed against the state), *aff'd*, 972 F.2d 1328 (2d Cir. 1992) (unpublished table decision); *Geames v. Henderson*, 725 F. Supp. 681, 685 (E.D.N.Y. 1989) (under *Barker*, delay caused by inaction of appointed counsel weighed against the state); *Harris v. Kuhlman*, 601 F. Supp. 987, 993-94 (E.D.N.Y. 1985) (institutional defects in "state's failure to screen, administer, and monitor [appointed] attorneys" was weighed against the state); *see also Threatt v. State*, 640 S.E.2d 316, 319-20 (Ga. Ct. App. 2006) (under *Barker*, noting that defendant requested a "second appellate counsel because the first one did nothing for an extended period of time" and weighing the delay against the state), *cert. denied*, 2000 Ga. LEXIS 337 (Ga. Apr. 24, 2007).

little else";[10] the failure to timely appoint counsel;[11] judicial and public defender office mismanagement of the appointed counsel system;[12] and lawyers who were

---

[10] *Compare Brooks*, 875 F.2d at 31; *United States v. Brown*, 2008 WL 4180051, at *2 (discussing turnover of appointed counsel and finding, under *Barker*, delay caused by "the need for substitute [appointed] appellate counsel" weighed in favor of indigent defendant); *Brown v. Costello*, 2004 WL 1837356, at *3 (under *Barker*, delay "caused primarily by turnover of appointed counsel . . . is attributable to the state") *with* J.A. 13-28 (recording the appointment of six different counsel to represent Brillon and that four of those lawyers made few filings other than those relating to continuances or withdrawals); *Brillon*, 955 A.2d at 1121 (finding Brillon's appointed counsel were removed "because they did not do anything to move his case forward, not because of any disagreements he may have had with them over trial strategy").

[11] *Compare Yourdon v. Kelly*, 769 F. Supp. 112, 114-15 (W.D.N.Y. 1991) (discussing the two year backlog of briefs and weighing a four month delay in appointment of counsel against the state under *Barker*) *with* J.A. 24-25, 27-28, 123, 155, 159, 243-53 (showing administrative failures at the Office of the Defender General and the court leaving Brillon without counsel from November 26, 2002 until January 15, 2003, and April 10, 2003 until August 1, 2003); *Brillon*, 955 A.2d at 1121 (same).

[12] *Compare Simmons v. Reynolds*, 898 F.2d at 868 (weighing a delay caused by court's failure to "supervise its appointed attorneys and to monitor its own calendar" against the state under *Barker*) *with* J.A. 244-45 (Brillon's counsel was not aware he was appointed nearly two months after the court first ordered appointment because the court and Defender General had failed to send him the "paperwork" to review to determine if he had a conflict and "a notice to assign counsel assigning me to

(Cont'd)

unprepared because of "other case load commitments,"[13] understaffing,[14] and underfunding,[15] among other things.

Moreover, beyond the factual similarities, courts repeatedly have recognized that "the *reasons* for constraining appellate delay are analogous to the motives underpinning the Sixth Amendment right to a speedy trial." *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980) (emphasis added); *accord Simmons v. Beyer*, 44 F.3d at 1169 ("Although the interests at stake before

---

(Cont'd)
this case"); J.A. 249 (quoting the prosecutor stating "it seems apparent that the Defender General had previously ignored Judge Suntag's Order, or not complied with it in such a manner that made representation of Mr. Brillon possible"); J.A. 23 (showing appointed counsel missing filing deadlines and no action by the court); J.A. 26-28 (demonstrating a second trial date passing with no action by the court).

[13] *Compare Moreno*, 63 M.J. at 137 *with* J.A. 97-98, 163-67 (showing Ammons requested a continuance and was not prepared for trial because of his "inordinately large caseload").

[14] *Compare Green*, 917 F. Supp. at 1271-73 (charging the state for "systemic delays" where the public defender's office was "overwhelmed with more appointments than its staff can timely handle") *with* J.A. 165 (stating "Public Defenders are under funded and under staffed," as a reason for requesting a continuance); J.A. 227 ("[O]ur resources for ad hoc counsel are perilously thin.").

[15] *Compare Harris*, 15 F.3d at 1562 (underfunding of public defenders is not "an acceptable excuse for delay") *with* J.A. 165 (stating "Public Defenders are under funded and under staffed," as a reason for requesting a continuance).

trial and before appeal obviously differ, they are sufficiently similar to warrant the same general approach."); *Moreno*, 63 M.J. at 135 ("While *Barker* addressed speedy trial issues in a pretrial Sixth Amendment context, its four-factor analysis has been broadly adopted for reviewing post-trial delay due process claims.").[16] In fact, a defendant denied a speedy trial warrants even greater constitutional protection: "[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious." *Barker*, 407 U.S. at 533.[17] Indeed, "excessive [pretrial]

---

[16] *But see State v. Walker*, 667 A.2d 1242, 1246 (R.I. 1995) (declining to apply *Barker* analysis to post-trial delay).

[17] Of course, defendants who are incarcerated before trial—and presumed innocent—also risk violence, disease, and conditions detrimental to their wellbeing. *See*, *e.g.*, Prison Rape Elimination Act of 2003 § 2(2), 42 U.S.C. § 15601(2) ("[N]early 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000."); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379, 379 (2000), *available at* http://www.justdetention.org/pdf/soc/SexualCoercionRates7MidwesternPrisonMen.pdf (finding that twenty-one percent of inmates faced sexual coercion and seven percent were raped in a study of seven Midwestern prisons); Associated Press, *Prison's Deadliest Inmate, Hepatis C, Escaping*, MSNBC, Mar. 14, 2007, http://www.msnbc.msn.com/id/17615346/ (by some estimates around 40% of the prison population is infected with hepatitis C, compared to 2% in the general population); Comm'n on Safety

(Cont'd)

delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," such that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett v. United States*, 505 U.S. 647, 655 (1992); *cf. Harris*, 15 F.3d at 1563-66 (discussing prejudice from excessive appellate delays).

It is no wonder, then, that courts applying *Barker* to pretrial delays have found that inaction by public defenders or system breakdowns can weigh against the state. As Respondent Brillon demonstrates, the Vermont Supreme Court is just one of several state high courts recognizing as much. *See People v. Johnson*, 606 P.2d 738 (Cal. 1980) (in bank) ("The right [to a speedy trial] may also be denied by failure to provide enough public defenders or appointed counsel, so that an indigent must choose between the right to a speedy trial and the right to representation by competent counsel."); *Middlebrook v. State*, 802 A.2d 268, 274-75 (Del. 2002) (discussing the court's lack of oversight of appointed counsel and finding, under *Barker*, delays caused by defense counsel's unopposed requests for continuances

---

(Cont'd)

and Abuse in America's Prisons, *Confronting Confinement* 38 (2006), *available at* http://www.prisoncommission.org/pdfs/Confronting_Confinement. pdf ("Every year, more than 1.5 million people are released from jail and prison carrying a life-threatening infectious disease."). This Court repeatedly has recognized that the "interests of defendants which the speedy trial right was designed to protect," include "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532.

to take vacations weighed against the state); *Ruffin v. State*, 663 S.E.2d 189, 198-99 (Ga. 2008) (finding under *Barker* that delays caused by successive appointment of counsel to co-defendant could be attributed to the state and recognizing that delays caused by "overcrowded dockets, the government's failure to provide for sufficient numbers of judges, prosecutors, *or indigent defense counsel*, neglect by the prosecution or other government agents . . . must be counted against the government in the *Barker-Doggett* analysis" (emphasis added)), *petition for cert. filed* (U.S. Sept. 29, 2008) (No. 08-7602); *State v. Blair*, 103 P.3d 538, 542 (Mont. 2004) (finding that, under *Barker*, delay due to institutional reasons such as "problems" and "turmoil" in the public defender's office weighed against the state); *see also Glover v. State*, 817 S.W.2d 409, 410 (Ark. 1991) (finding that, after defendant's first counsel withdrew due to a conflict of interest, the two-month period in which the court did not appoint new counsel or inform defendant of counsel's withdrawal weighed against the state). State lower courts follow suit.[18]

---

[18] *E.g.*, *Sanchez v. Superior Court*, 182 Cal. Rptr. 703, 706 (Cal. Ct. App. 1982) ("Conflicting trial obligations resulting from the routine assignment of heavy case loads to chronically overburdened deputy public defenders and appointed counsel may not constitute good cause for such delay."); *State v. Stock*, 147 P.3d 885, 893 (N.M. Ct. App. 2006) (under *Barker*, delay caused by overburdened public defender's office weighed against the state (citing *Johnson*, 606 P.2d at 741, 747; *Middlebrook*, 802 A.2d at 272-75; *Harris*, 15 F.3d at 1562; and *Moreno*, 62 M.J. at 137)), *cert. quashed*, 152 P.3d 152 (N.M. Jan. 30, 2007) (unpublished table decision); *cf. State v. Kurz*, No. A04-1255, 2005 WL 1514420, at *3 (Minn. Ct. App. June 28, 2005)

(Cont'd)

Moreover, under the fact-specific inquiry of *Barker*, courts have been quite capable of distinguishing between routine delays, delays caused by dilatory conduct of defendants or their counsel, and delays caused by breakdowns in public defender systems.[19]

The Vermont Supreme Court's opinion thus does not adopt a "unique theory," Pet'r Br. 1, but instead is in line with decades of jurisprudence from state and federal courts applying *Barker* in both the pre- and post-trial context. This Court should affirm.

(Cont'd)

(unpublished) (finding that although "[a] combination of public-defender staffing issues and court scheduling congestion was the primary reason for delay of [defendant's] trial[,]" the weight against the state was diminished by the absence of intentional delay); *see also Isaac v. Perrin*, 659 F.2d 279, 282 (1st Cir. 1981) (holding that delay caused by the structure of the criminal system, which often left defendants without counsel for large periods of time, was institutional delay that weighs against the state); *United States v. Denson*, 668 F. Supp. 1531, 1534 n.6 (S.D. Fla. 1987) (under *Barker*, institutional failure of public defender's office to file any motions, request discovery, or demand a speedy trial weighed against state), *aff'd*, 859 F.2d 925 (11th Cir. 1988) (unpublished table decision).

[19] *See*, *e.g.*, *State v. Frausto*, 53 P.3d 486, 493 (Utah Ct. App.) (distinguishing delay caused by defendant's repeated dismissal of his counsel, who all worked diligently on his appeal, from the "systematic" delay in *Harris v. Champion*), *cert. denied*, 63 P.3d 104 (Utah 2002); *see also* cases cited at Pet'r Br. 30-34.

II. NO EXCEPTIONAL CIRCUMSTANCES EXIST TO WARRANT DISPLACING THE STATE COURT'S FACTUAL FINDINGS CONCERNING THE CAUSE FOR THE THREE-YEAR DELAY IN BRINGING BRILLON TO TRIAL

In light of the well established jurisprudence in this area, Vermont and its *amici*—through a selective and inaccurate characterization of the record—attempt to call into doubt the reasons for the near three-year delay in bringing Brillon to trial. The Court should decline this invitation to displace the Vermont Supreme Court's findings of fact.

This Court traditionally "accept[s] the factual findings of state courts in the absence of exceptional circumstances." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987).[20] Even where relevant factual findings are

[20] None of the exceptions to this rule is applicable here. This is not a case "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it" or where "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927); *accord Miller v. Fenton*, 474 U.S. 104, 114-15 (1985) (voluntariness of confession is "a legal inquiry requiring plenary review," not an issue of "historical fact" entitled to statutory deference); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) (finding of "actual malice" in an action for defamation of a public figure is subject to "independent appellate review," and "is not merely a question for the trier of fact"); *Drope v. Missouri*, 420 U.S. 162, 174-75 (1975) (finding of competence to stand trial is subject to plenary appellate review); *Brookhart v. Janis*, 384 U.S. 1, 4 n.5 (1966) (finding of waiver of a constitutional right is subject to plenary appellate review).

rendered in the first instance by a state's highest court, those facts traditionally will not be disturbed by this Court absent "exceptional circumstances." *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952) ("There are no exceptional circumstances of any kind that would justify us in rejecting the [Arkansas] Supreme Court's findings; they are not without factual foundation, and we accept them."); *see also Time*, *Inc. v. Firestone*, 424 U.S. 448, 463 (1976).

Indeed, in a situation analogous to the one here, this Court refused to disturb the facts that supported a lower court's balancing of the second *Barker* factor—the reason for pretrial delay. In *Doggett v. United States*, 505 U.S. 647 (1992), a federal district court found that the defendant, a longtime fugitive from justice, had been unaware of his indictment and that the government failed diligently to pursue his whereabouts. On appeal, the Government tried to explain the delay by claiming that it had "sought Doggett with diligence." *Id.* at 652. This Court, however, ruled that "[t]he findings of the courts below are to the contrary, . . . and we review trial court determinations of negligence with considerable deference." *Id.* (citing, *inter alia*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990)). "The Government gives us nothing to gainsay the findings that have come up to us, and we see nothing fatal to them in the record." *Id.* The Court also rejected the Government's contention that the defendant had known of his indictment, stating that the defendant "won the evidentiary battle on this point" in the district court and the Government was merely "trying to revisit the facts." *Id.* at 653.

Likewise here, Vermont is merely "trying to revisit the facts" already determined by the state court. For example, the Vermont Supreme Court expressly found that Brillon had not acted with improper intent when he repeatedly sought counsel who would prepare adequately for a trial in which he faced a possible life sentence:

> While we recognize that defendants may attempt to manipulate the system by creating delay that could conceivably support later speedy-trial claims, *the record does not support the State's suggestion that this occurred here*, and the district court made no such finding. To the contrary, the record reveals that defendant consistently sought to be tried by competent counsel as quickly as possible. While defendant moved for the removal of several of the attorneys assigned to his case, *he did so because they did not do anything to move his case forward* . . . .

Brillon, 955 A.2d at 1121 (emphasis added). Any dispute over Brillon's intent presented a question of fact, which the Vermont Supreme Court resolved in Brillon's favor. *See United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) ("Whether someone held a belief or had an intent is a true-or-false determination" and a "clear question[] of fact."); *Clark v. Arizona*, 548 U.S. 735, 794 (2006) ("[T]he issue of intent and knowledge is a straightforward factual question."); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace.") (collecting cases).

Vermont invites this Court to disregard the factual findings below, in favor of its contradictory assertions that Brillon intentionally delayed his trial for various improper purposes. *See*, *e.g.*, Pet'r Br. 9 (asserting that Brillon fired his first lawyer "to delay the case"); *id.* at 10 (asserting that rotation of judges "gave Brillon every incentive to delay the trial"); *id.* at 12 ("Brillon turned to his fallback strategy – to delay the trial by getting rid of his counsel."); *id.* at 23 (referring to "Brillon's delay tactics"); *id.* at 27 ("In this case, there is ample evidence that many of Brillon's delays were intentional."). These "facts" are not only refuted by the record, Vermont offers no "exceptional circumstances" to justify this Court even considering them. Accordingly, this Court should defer to the Vermont Supreme Court's findings of fact and affirm the ruling below.

CONCLUSION

For the foregoing reasons, the judgment of the Vermont Supreme Court should be affirmed.

Respectfully submitted,

Steven R. Shapiro
Robin L. Dahlberg
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Anthony J. Franze
Counsel of Record
Joel D. Rohlf
Arnold & Porter LLP
555 12th Street N.W.
Washington, DC 20004
(202) 942-5000

Maureen Dimino
Indigent Defense Counsel
National Association of
Criminal Defense Lawyers
1660 L Street N.W.
12th Floor
Washington, DC 20036
(202) 872-8600

Dan Barrett
ACLU of Vermont
Foundation
137 Elm Street
Montpelier, VT 05602
(802) 223-6304

Craig A. Stewart
Arnold & Porter LLP
399 Park Avenue
New York, NY 10022
(212) 715-1000

Counsel for Amici Curiae